

BEFORE  
THE PUBLIC SERVICE COMMISSION OF  
SOUTH CAROLINA

DOCKET NOS. 89-6-E & 90-7-E - ORDER NO. 90-655✓

JULY 3, 1990

IN RE:	Adjustment of Base Rates	)	ORDER DENYING PETITION
	for Fuel Costs for	)	FOR RECONSIDERATION
	South Carolina Electric &	)	OF ORDER NO. 90-503
	Gas Company	)	

This matter comes before the Commission by way of the Petition of the Consumer Advocate for the State of South Carolina (the Consumer Advocate) for Reconsideration of Order No. 90-503, entered in the instant proceeding on May 31, 1990. Issued pursuant to S.C. Code Ann., §58-27-865 (1976), as amended, Order No. 90-503 approved a fuel component of 1.525 cents per KWH to be included in the base rates for retail electric service provided by South Carolina Electric & Gas Company (SCE&G or the Company), effective with the first billing cycle in May, 1990.

The Consumer Advocate requests the reconsideration and withdrawal of Order No. 90-503, pending disposition of a judicial proceeding for review of a separate Order, and the adoption of an adjustment to the Company's fuel costs which the Commission had declined to accept. Specifically, the Consumer Advocate maintains that the Commission's denial of his motion for a continuance of the hearing in this matter constituted an abuse of discretion and that the evidence and the findings in Order No. 90-503 are insufficient

to justify the Commission's refusal to adopt the proposed fuel cost adjustment. The Commission rejects the arguments of the Consumer Advocate and reaffirms Order No. 90-503.

The Consumer Advocate first reiterates his request for a continuance of this proceeding, pending the disposition of an action for judicial review of Commission Order No. 90-177, issued on February 22, 1990. That Order denied a motion of the Consumer Advocate to compel SCE&G to produce in discovery certain documents without the protection of a confidentiality agreement.<sup>1</sup> Order No. 90-177, and Order No. 90-335, dated March 28, 1990, determined that the documents were entitled to protection and that they should be provided to the Consumer Advocate pursuant to a confidentiality agreement among the Consumer Advocate, his consultants and SCE&G.

Immediately prior to the hearing in this proceeding on April 25, 1990, approximately two months after the issuance of Order No. 90-177 and four weeks after the issuance of Order No. 90-335, the Consumer Advocate sought a continuance of that hearing indicating that the failure to agree to the content of the confidentiality agreement had prevented the Consumer Advocate from securing necessary information and that the Commission's Orders had precluded the Consumer Advocate from adequately representing consumers in this matter. See, Motion of Consumer Advocate for

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1. The documents at issue were certain coal supply contracts and transportation agreements to which SCE&G was a party. In this proceeding, SCE&G had continuously indicated that such documents were relevant to this proceeding and would be provided to the Consumer Advocate upon the issuance of a protective order or execution of a confidentiality agreement.

Continuance, dated April 22, 1990. The Motion was repeated orally at the hearing and was thereafter denied on the basis that it had been the Commission's consistent practice to allow coal supply contracts and transportation agreements to be treated as confidential.

Any impairment of the Consumer Advocate's preparation for this hearing has been a consequence of his own decisions. If the Consumer Advocate had entered into a confidentiality agreement, the Consumer Advocate would have had full and timely access to the information and full use in the hearing. The Consumer Advocate could have entered into an agreement which provided a procedure for the Commission's review of any request of the Consumer Advocate to disclose the information to non-signatories if SCE&G refused to authorize such disclosure. Presumably, the Consumer Advocate could have then sought review of any adverse decision in that instance.

After the issuance of Order No. 90-177, the Consumer Advocate insisted that the confidentiality agreement which SCE&G proposed contain a provision expressly recognizing the Consumer Advocate's reservation of a right to appeal Order No. 90-177 to contest the Commission's determination that the documents at issue should be protected. Petition of Consumer Advocate for Reconsideration of Order No. 90-177, dated March 12, 1990.

By refusing to sign a confidentiality agreement without the clause preserving a right of appeal, the Consumer Advocate decided to deny himself access to the documents and to impair his ability to prepare for the hearing in this matter. Had he signed SCE&G's

proposed agreement, the Consumer Advocate would have had timely access to the documents for preparation and would have had full use of such documents for the presentation of evidence and cross-examination in the hearing and would have had the opportunity to disclose the protected information to third parties upon agreement by SCE&G or under order of this Commission. However, he chose not to avail himself of those provisions and thereby not obtain access to the information. Instead, the Consumer Advocate insisted upon the inclusion of a provision which was unnecessary to secure availability of the documents and which the Commission indicated had no bearing at all on his right to seek judicial review of Order No. 90-177. See, Order No. 90-335 at 3. In short, only the Consumer Advocate's own decision to insist on the unnecessary contractual provision precluded his access to, and use of, the documents. That decision does not constitute legal error on the part of the Commission. Palmetto Alliance, Inc. v. South Carolina Pub. Serv. Comm'n, 282 S.C. 430, 319 S.E.2d 695 (1984).

Although the Commission denies the Consumer Advocate's Petition for Reconsideration, the Commission is concerned about the issue of the confidentiality of coal contracts and has set a generic hearing on October 17, 1990, for all jurisdictional electric utilities and any interested parties to address this issue fully.

Another issue raised by the Consumer Advocate is that his failure to review the documents prior to the hearing makes it impossible for the Commission to comply with the provisions of

§58-27-865 and fix the fuel component in the Company's base rates for the recovery of the costs of fuel which the Commission finds appropriate. Absent his review of the documents, the Consumer Advocate maintains that the record of this proceeding is insufficient to permit the Commission to make proper findings with respect to the appropriate fuel costs and the Company's fuel purchasing activities and fuel consumption.

The Commission is aware of no authority which would make its ultimate determinations contingent upon the ability of a party to secure requested documents in prehearing discovery, particularly where that ability was compromised only by the party's own actions. The Commission's approval of the fuel component in Order No. 90-503 was based on a full record containing evidence submitted by the Company and the Commission Staff including the results of the investigation and audit of fuel costs and purchasing activities conducted by the Staff. See, Order No. 90-503 at 5-9. The findings in that Order are explicitly stated and based on substantial evidence.

It is the Commission's responsibility to determine whether the Company's fuel costs and its efforts to minimize fuel costs are reasonable and then to approve a fuel component which is appropriate, and to issue an order with findings properly articulated and based on substantial evidence. A party cannot refuse to take advantage of the timely availability of documents in discovery, impose unnecessary conditions upon its consent to a confidentiality agreement, move to continue a proceeding only two

days prior to the scheduled hearing on the grounds that it intended to challenge a discovery order,<sup>2</sup> and then successfully maintain that the Commission abused its discretion and was somehow precluded from the performance of its regulatory responsibility.

The Consumer Advocate likewise seeks reconsideration of that portion of Order No. 90-503 by which the Commission declined to adopt a recommendation of the Commission Staff to adjust the Company's "over-under recovery account" as a consequence of an unscheduled outage of the V.C. Summer Nuclear Station (the Summer Station) during the period under review. The Consumer Advocate claims that such determination was "without underlying support." The Consumer Advocate is incorrect.

The Commission Staff had proposed the adjustment for an alleged "management error" in scheduling certain maintenance for the Summer Station during a time of system peak load. (TR. at 94). Because of the combined results of a "personnel error" and the failure of certain equipment (TR. at 50-51 and 54), an unscheduled outage occurred on July 11, 1989.

In Order No. 90-503, the Commission found that "it was reasonable for SCE&G to believe, at the time, that the work to be done on July 11 was low risk based on the testimony of SCE&G witness Skolds." Order NO. 90-503 at 8. Apparently, the Consumer

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2. At the time of the hearing in this matter, the Consumer Advocate had yet to initiate any action for review of the discovery orders at issue. (TR. at 8). The Consumer Advocate subsequently filed a Petition for Judicial Review of Order Nos. 90-177 and 90-335 a week after the hearing in this proceeding. See, Hamm, etc., v. South Carolina Public Service Commission, (90-CP-40-2102).

Advocate believes that the Commission should not have been persuaded by the Company's evidence. Yet that evidence plainly demonstrated that the Company undertook its normal planning of maintenance requirements and the timing of maintenance activities in its evaluation of the "low risk" nature of the maintenance and in its decision to proceed with the action on July 11, 1989, and that its reliance on engineering diagrams was reasonable. (TR. at 49-51). Furthermore, the evidence is clear that the incomplete nature of those diagrams, the "personnel error" and the equipment failure were events which were not reasonably foreseeable by the Company. (TR. at 60-61).

The Commission's determination not to adopt the Staff's adjustment was based on the substantial evidence that the Company's decision and actions were reasonable. We must evaluate the prudence of that decision and the ensuring actions at the time the decision was made and the actions undertaken. See, Violet v. FERC, 800 F.2d 280 (1st Cir. 1986); and State ex rel. Util. Comm'n v. Mebane Home Tel. Co., 298 N.C. 162, 257 S.E.2d 623 (1979). As the Staff testified, the law does not require a utility to demonstrate that its actions were perfect, only that it took "reasonable steps to safeguard against error." (TR at 96). See, Hamm v. South Carolina Pub. Serv. Comm'n, 291 S.C. 178, 352 S.E.2d 476 (1987). Here, SCE&G's actions at the time they were taken were prudent and its reliance on its established maintenance procedures was reasonable. We do not interpret our responsibility under §58-27-865 to require us to demand that a utility "safeguard

against [an] error" which is not reasonably foreseeable.

The Commission finds that the evidence supporting the finding embodied in the disposition of this issue in Order No. 90-503 was substantial and fully supports that decision.


IT IS THEREFORE ORDERED:

1. That the relief requested in the Petition of the Consumer Advocate for Reconsideration of Order No. 90-503 be, and hereby is, denied.

2. That the provisions of Order No. 90-503 remain in effect as originally promulgated.

3. That this Order shall remain in full force and effect until further Order of the Commission.

BY ORDER OF THE COMMISSION:

  
Chairman

ATTEST:

  
Deputy Executive Director

(SEAL)